State of Michigan
In The
Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS

EVA DEVILLERS, as Guardian and Conservator of
MICHAEL J. DEVILLERS,

Plaintiff-Appellee, Supreme Court No. 126899

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

Court of Appeals No: 257449
Oakland County Circuit Court No: 02-045287-NF

DEFENDANT-APPELLANT'S REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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INTRODUCTION

Plaintiff asserts that it is "misleading" and "laughable" to include this case in the same category with others seeking more money on stale claims. (Plaintiff's Brief, p 8). Plaintiff misses the point.

In the instant case, like the others referenced by ACIA, the claimant cites Lewis v DAIIE, 426 Mich 93; 393 NW2d 167 (1986), as authority for the recovery of benefits for losses incurred more than one year prior to filing suit, despite the language of §3145(1). The relatively modest amount involved in the instant case does not remove it from the class of lawsuits in which Lewis and Johnson v State Farm Mutual Automobile Ins Co, 183 Mich App 752; 455 NW2d 420 (1990), are invoked to circumvent that statute. That category of cases **is** bleeding tens of millions of dollars ultimately from the pockets of the motoring public in this State.

I. LEWIS WAS WRONGLY DECIDED BECAUSE IT IS CONTRARY AND INIMICAL TO THE LEGISLATIVE INTENT SET FORTH IN THE UNAMBIGUOUS LANGUAGE OF MCL 500.3145(1).

Plaintiff spends the first several pages of this issue (Plaintiff's Brief, p 10-14) discussing what a "good idea" Lewis was and how it has "worked". As proof of that point, Plaintiff asserts:

> "For over fifteen (15) years, stale claims have not been an issue until the Cameron decision altered the landscape concerning brain injured claimants."

(Plaintiff's Brief, p 19).

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Plaintiff has it exactly backwards. Stale claims have become an issue ever since it has become popular to invoke the insanity/minority tolling provision of MCL 600.5851(1)[1] and/or Lewis/Johnson tolling to litigate claims going back months, years, or decades.

In any event, all of that is beside the point. In the absence of any ambiguity, §3145(1) is to be enforced as written. E.g., Tryc v Michigan Veterans' Facility, 451 Mich 129, 135-36, 545 NW2d 642 (1996); Rinke v Potrzebowski, 254 Mich App 411, 414, 657 NW2d 169 (2002). Obviously aware of that, Plaintiff attempts to create an ambiguity which is not in the language of the statute itself, but supposedly "within the context of the entire no fault benefit statutory scheme". (Plaintiff's Brief, p 14-18).

To identify and discuss every non sequitur and other flaw in Plaintiff's statutory analysis would consume far more space than Plaintiff's argument is worth. Accordingly, ACIA will take a more direct route to demonstrating the correct result.

The linchpin of Plaintiff's argument is the false dichotomy that she posits:

> "Does the loss mentioned in the second [sic, third] sentence [of §3145(1)] relate back to the work loss and survivor's loss in the previous sentence, **thereby excluding allowable expenses from the one year**

[1]That was the statute involved in Cameron v ACIA, 263 Mich App 95; 687 NW2d 354 (2004), lv app pending.

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> **limitation**? Or does that loss refer to the loss mentioned in MCL 500.3142(1) which states[,] 'Personal protection insurance benefits are payable as loss accrues'?"

(Plaintiff's Brief, p 17) (emphasis added).

Careful consideration of Plaintiff's discussion demonstrates that the premise for the entire exercise is that "allowable expense" may or may not be included in the "loss incurred" referenced in the third sentence of §3145(1).[2] However, perusal of the relevant language of the statutory provisions Plaintiff cites, plus reference to the relevant case law, demonstrates that the plain meaning of the phrase "loss incurred" in §3145(1) includes **all** personal injury protection benefits payable under the Act.

All of the provisions describing the benefits payable describe forms of financial detriment:

- Section 3107(1)(a) describes "allowable expense" as "reasonable charges incurred".
- Section 3107(1)(b) describes "work loss" as lost wages.
- Section 3107(1)(c) describes recovery for other "expenses . . . reasonably incurred".
- Section 3108(1) describes "survivor's loss" as the loss of things of tangible economic value.

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[2]If "allowable expense" is included within "loss incurred" -- as it is, see supra -- then there is no ambiguity as to the scope and application of the one-year-back rule. In terms, it would apply to all benefits.

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The provisions governing the timing of payment likewise describe financial detriment:

- Section 3142(1) states that benefits are payable "as loss accrues".
- Section 3142(2) defines the trigger for no-fault interest as the receipt of reasonable proof of "the fact and of the amount of loss sustained".
- And, of course, §3145(1) refers to "loss incurred".

The question is whether the term "loss" in the third sentence of §3145(1) plainly includes all of the financial detriments for which the Legislature has mandated compensation under the No-Fault Act. The case cited by Plaintiff sets forth the principles relevant to that inquiry:

> "When construing a statute, the Court's primary obligation is to ascertain the legislative intent that may be **reasonably inferred** from the words expressed in the statute. [Citation omitted]. If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning expressed."
>
> * * * *
>
> "'[W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole.'"

G C Timmis v Guardian Alarm Co, 468 Mich 416, 420, 421 (2003) (emphasis added).

Because the term "loss" is undefined, reference to dictionary definitions is appropriate to ascertain the commonly understood meaning of the word. MCL 8.3a; Stanton v Battle Creek, 466 Mich 611, 617; 647 NW2d 508 (2002). Moreover, the principles underlying the doctrine of noscitur a sociis require that we

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accord the term the meaning which is conceptually related to the language which surrounds it. G C Timmis, supra at 430 n 2.

> "**Loss** . . . **6:** the amount of an insured's financial detriment due to the occurrence of a stipulated contingent event (as death, injury, destruction or damage) in such a manner as to charge the insurer with a liability under the terms of the policy."

Webster's Third New International Dictionary, Unabridged Edition (Merriam Webster 1986), p 1338.

> "**loss** . . . **7.** the amount of a claim on an insurer by an insured."

The American Heritage Dictionary, Second College Edition (Houghton Mifflin Co 1982), p 743.

> "**loss** . . . **3.** the amount of financial detriment caused by an insured person's death or an injured property's damage, for which the insurer becomes liable."

Black's Law Dictionary, Seventh Edition (West Group 1999), p 956.

Applying the foregoing principles and definitions exposes Plaintiff's analysis as a concocted caricature of statutory analysis intended to create an ambiguity where none exists. There is no rational basis for inferring that the term "loss" in the third sentence of §3145(1) would include anything less than all of the no-fault benefits sought by the claimant filing suit.

In short, Plaintiff's argument falls with its premise.[3] The language of §3145(1) is unambiguous and should be enforced as written without the judicial amendment imposed by Lewis.

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[3]Plaintiff's extremely confusing presentation also fails to explain how Lewis addresses the imaginary conflict between §3142(1) and §3145(1).

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Finally, Plaintiff argues that it is the **Legislature's** fault that this Court ignored the unambiguous language of §3145(1). Citing Secura Ins Co v Auto-Owners Ins Co, 461 Mich 382; 605 NW2d 308 (2000), which held that judicial tolling does not apply to §3145(2)[4], Plaintiff writes:

> "Consideration must be given to the significant differences in statutory language between Sections 1 and 2 of the disputed statute. **If the Legislature had wanted to forestall any chance of judicial tolling regarding first party benefit claims, the same mandatory language would have been used in both sections of the same statute**."

(Plaintiff's Brief, p 18-19) (emphasis added).

The reason for the difference in language between the two provisions derives from the difference in the types of benefits involved. Personal injury protection benefits very frequently include losses ongoing for more than one year. Therefore, barring suit more than one year after the accident would literally leave a claimant without a means of enforcing the insurer's statutory obligation. On the other hand, the total amount of property protection loss can invariably be determined within one year of the accident. Therefore, there is no need for allowing any provision for the payment of benefits after that date.

Beyond that, blaming the Legislature for this Court's refusal to apply unambiguous statutory language inverts the

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[4] "(2) An action for recovery of property protection insurance benefits shall not be commenced later than 1 year after the accident."

relationship between the legislative and judicial branches. It is the latter which is to defer to the former, not vice-versa.

In sum, Plaintiff presents no tenable reason for refusing to overrule the blatant usurpation of legislative prerogative embodied in the Lewis/Johnson tolling doctrine.

II. THIS COURT SHOULD GIVE EITHER FULL OR LIMITED RETROACTIVE EFFECT TO ITS DECISION OVERRULING THE JUDICIAL TOLLING DOCTRINE.

In her argument on this issue, Plaintiff makes three points.

First she argues that retroactivity analysis is warranted because reversal of Lewis would not return the law to that which existed before. As the basis for that argument, Plaintiff points to the pre-Lewis conflict between Court of Appeals decisions enforcing the unambiguous statutory language and those which refused to do so. (Plaintiff's Brief, p 20). Again, Plaintiff misses the point.

ACIA's citation to Wayne County v Hathcock, 471 Mich 445; 684 NW2d 765 (2004) (ACIA's Brief, p 20-21), was premised on the Legislature's intent when it enacted §3145(1). The "before" to which ACIA refers was the period prior to which the appellate judiciary took it upon itself to rewrite the statute. This Court's enforcement of unambiguous statutory language according to its terms cannot be considered "unexpected". Therefore, there is no reason to deviate from the general rule of full retro-

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activity. See Curtis v City of Flint, 235 Mich App 555, 566; 655 NW2d 791 (2002).

Second, Plaintiff relies on Pohutski v City of Allen Park, 465 Mich 675; 641 NW2d 219 (2002), as the basis for granting prospective application only to a decision to overrule Lewis. (Plaintiff's Brief, p 21-23). Although most of Plaintiff's argument was adequately addressed in ACIA's principal brief, two points distinguishing Pohutski, are worth noting here.

One is that the instant case involves more than a mere error in the interpretation of a statute. Lewis involved an outright **refusal** to enforce a statute as written. A failure to correct that thwarting of legislative intent at the earliest possible moment "would perpetuate an unacceptable abuse of judicial power". Robinson v City of Detroit, 462 Mich 439, 473; 613 NW2d 302 (2000) (Corrigan, J., concurring).

Another distinction is that giving retroactive application to the holding in the instant case will not create the type of "distinct class of litigants denied relief because of an unfortunate circumstances of timing" to which Pohutski referred. This Court's concern in Pohutski was that retroactive application would mean that a category of claimants would be unable to recover despite a **new legislatively created remedy** which would not apply to them "because of an unfortunate circumstance of timing". Id. at 698-99.

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Thus, it was **deference to the legislative purpose** of the new remedy which moved this Court to implement the unusual device of prospective application. In the instant case, such a holding would **thwart** the legislative intent which this Court is bound to enforce.

Finally, Plaintiff argues that retroactive application would result in "thousands of lawsuits" being filed "for fear that the ticking time bomb" of §3145(1) would "explode". (Plaintiff's Brief, p 22-23). Plaintiff fails to apprehend that that result follows from the very existence of §3145(1), i.e., it will occur even with purely prospective application.

In sum, Plaintiff fails to make a case for the unusual -- and constitutionally suspect, Hathcock, supra at 488 n 98 -- measure of giving prospective effect to a holding correcting the judicial usurpation of legislative prerogative. Moreover, Plaintiff does not even discuss an alternative to the type of retroactive application requested in ACIA's principal brief.

III. IT IS UNNECESSARY TO LITIGATE THE APPLICABILITY OF A DOCTRINE IN ORDER TO DECIDE WHETHER TO ABOLISH THAT DOCTRINE. (Plaintiff's Issue III., p 24).

Plaintiff accuses ACIA of misleading this Court by "selectively choosing facts" and asking this Court to assume that prior to filing her Complaint, Plaintiff did not make a claim for home attendant care benefits. (Plaintiff's Brief, p 8). Plaintiff argues that whether such a claim was made must be determined in

the trial court before this Court can decide whether to overrule Lewis/Johnson.[5]

The short answer is that whether Plaintiff made a claim sufficient to invoke Lewis is relevant only if Lewis is viable. If not, whether Plaintiff made such a claim is simply irrelevant. That is why ACIA did not ask this Court to assume anything as to the existence of a specific claim for the benefits at issue. Even if such a claim were made, it would not change ACIA's position on the issues presented.

ACIA prays this Honorable Court to grant the relief requested in its principal brief.

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[5]Johnson, incidentally, does not even require a request for benefits. (ACIA's Brief, p 6).